1966

# Rocket Mining Corporation, A Utah Corporation, and Pioneer Carissa Gold Mines, Inc., A Wyoming Corporation v. Bulan J. Gill and Angelo M. Billis : Plaintiff Respondents' Reply Brief

# N THE SUPREME COURT
# F THE STATE OF UTAH

OCKET MINING CORPORATION, a Utah corporation, and PIONEER CARISSA GOLD MINES, INC., a Wyoming corporation,
*Plaintiffs, Respondents and Cross-Appellants,*

— vs. —

ULAN J. GILL, LENORE M. BILL, RAY GILL, ANGELO M. BILLIS, HERMAN F. LUND and T. W. BILLIS,
*Defendants, Appellants and Respondents.*

Case No. 10[illegible]

UNIV[illegible]

## laintiff-Respondents' Reply

APPEAL FROM THE JUDG[illegible]
OF THE THIRD DISTRICT C[illegible]
FOR SALT LAKE COUNT[illegible]
HONORABLE ALDON J. ANDERSON, J[illegible]



GORDON I. HYD[illegible]
555 East 4th South
Salt Lake City, Utah
*Attorney for Plaintiffs, Respondents and Cross-Appellants*

VID K. WATKISS,
LEY, HAYS, RAMPTON & W[illegible]
El Paso Natural Gas Bldg.
t Lake City, Utah
*Attorney for Defendants, Appellants and Respondents*

TABLE OF CONTENTS



CASES CITED

# IN THE SUPREME COURT OF THE STATE OF UTAH

ROCKET MINING CORPORATION, a Utah corporation, and PIONEER CARISSA GOLD MINES, INC., a Wyoming corporation,
*Plaintiffs, Respondents and Cross-Appellants,*

—vs.—

RULAN J. GILL, LENORE M. GILL, RAY GILL, ANGELO M. BILLIS, HERMAN F. LUND and T. W. BILLIS,
*Defendants, Appellants and Respondents.*

Case No. 10467

## Plaintiff-Respondents' Reply Brief

### STATEMENT OF THE KIND OF CASE

This is an action brought by the plaintiff corporation against the promoters, officers and directors of Rocket Mining Corporation to recover salaries unlawfully paid to some of the officers and directors and to recover the proceeds from the sale of the corporate assets which were distributed to the officers and direc-

tors of Rocket Mining Corporation. The plaint claim with reference to the salaries paid is based u the theories (a) that the payment of salaries and com sation was in violation of an agreement made by corporation and the defendant-directors for the be fit of the stockholders of Rocket Mining Corporat at the time the corporation registered its stock w the Securities Department of the State of Utah a with the Securities and Exchange Commission of United States, and (b) that the voting of salaries the defendants, Rulan J. Gill and Angelo M. Billis, a the payment of said salaries in the amount of $17,400 was authorized pursuant to a resolution passed at meeting illegally called, which meeting was not a tended by a quorum of directors.

The claim with reference to the sale of the corp rate assets and the distribution to the promoters an directors of the proceeds from such sale is based upo the theories (a) that such action constituted a violati of the directors' fiduciary duty to the corporation an its stockholders and constituted a corporate fraud, an (b) that the resolution authorizing the sale of the cor porate assets and the payment of the proceeds fro such sale to the directors and promoters was passed a a meeting which was not attended by a quorum of disin terested directors and it was, therefore, void.

The plaintiffs have also asked for an accountin from the directors of their handling of the corpora funds and properties.

## DISPOSITION IN LOWER COURT

In the lower court the plaintiffs moved for summary judgment as to Count 1 of the First Cause of Action for the salaries unlawfully paid and as to Count 3 as it pertains to the sale of the corporate properties for $130,000.00 and the distribution of the proceeds to the promoters and directors. The lower court granted the motion as to Count 1 of the First Cause of Action but denied the motion as to Count 3 of the First Cause of Action. The court granted judgment against Gill and Billis for the exact amount of the salaries each received instead of granting a judgment against them jointly and severally for the total amount paid out to them by the corporation. The trial court limited the basis for the judgment to the theory that the payment of salaries was in violation of an express agreement made for the benefit of the stockholders that the defendants would not take salaries until the mining operations of the corporation were on a paying basis.

## RELIEF SOUGHT ON APPEAL

The respondents in their cross-appeal seek to have the judgment of the trial court modified and judgment entered jointly and severally against the defendants for the total amount of the salaries paid and interest thereon and for summary judgment on Count 3 of the First Cause of Action for the proceeds which the defendants paid to themselves resulting from the sale of the corporate interest in the Rim Group of claims for $130,000.00.

## STATEMENT OF FACTS

The plaintiff-respondents have set forth a comprehensive statement of the facts in their reply brief, from the record in each instance the basis for any contended as being established. (See, plaintiff-respondents' brief, pp. 4-8, inclusive.)

The plaintiff-respondents will not restate the in this reply brief but we do point out that none of allegations of fact in defendant-appellants' brief (5-8) are supported by any citations from the record in many instances consist of nothing more than bare expressions of opinion and statements of facts that not relevant. Reference is made to the statement of fa in respondents' brief which are the only material fa on the issues raised by the defendant-appellants in the appeal and by the plaintiff-respondents' cross-appeal would serve no useful purpose to restate these facts this brief.

## ARGUMENT

### POINT I.

### THE COURT SHOULD PROPERLY CONSIDER THE ISSUES RAISED BY THE CROSS APPEAL SINCE BOTH PARTIES MOVED FOR JUDGMENT ON THE RECORD

It is well settled law that where both parties mo for judgment on the record contending that they are e titled to judgment as a matter of law, the court ma determine the motions based on the facts before it and such a decision may be raised on appeal the right to

trial on any other facts having been waived. *Mastic Tile Division of Ruberoid Co.* v. *Acme Distributing Co.*, 15 U. 2nd 136, 389 P. 2d 56. The defendant-appellants move to dismiss the causes of action upon which the plaintiff-respondents had made their motion for summary judgment, contending that as a matter of law the issues should be resolved in their favor. (R. 167) The trial court, having considered the motions of both parties, granted the motion of the plaintiff-respondents as to Count One on the First Cause of Action but denied the motion as to Count Three. All of the facts necessary to adjudicate Count Three were admitted by both parties and cannot be in dispute and there are no facts which could be presented to the court at any stage of the proceedings that would effect the right of the plaintiff to a judgment as to Count Three. The admitted facts are as follows:

1. That the articles of incorporation provided for a board of directors consisting of not less than three members and not more than twenty-five. (See, Ex. P-6 and P-7)

2. At the annual stockholders meeting on July 17, 1956, the stockholders resolved to establish a board of seven directors. (See, R. 140, p. 41 of Minute Book, Ex. P-2)

3. On December 26, 1957, a directors' meeting was held pursuant to a waiver of notice, which waiver of notice was signed by only R. J. Gill, Lenore Gill, Ray Gill and T. W. Billis, who were not even all of the directors then holding office.

4. At this improperly called meeting the direc proposed to sell some of the corporate properties for sum of $130,000.00 and pay the bulk of the proceeds themselves. (See, R. 145 and 146, pp. 83 and 84 of M ute Book, Ex. P-2) Under the authorities cited un Point II, p. 19 of its brief, the plaintiff should be entit to judgment on Count Three as a matter of law and purpose could be served in permitting the defendants go to trial on this issue.

It is not necessary to get into any extenuating c cumstances as contained in defendant-appellants' br The simple fact is that the defendants called an unlaw meeting and conducted business at that meeting wi out a quorum of directors, disposing of corporate pro erty and pursuant to such invalid resolution they receiv the funds and without even delivering the funds to t corporation they cashed the check and disbursed it in cordance with the invalid resolution. No amount of dence as to the good faith, hard work or intention the defendants as contended for by the defendant-app lants in their brief would alter the above facts a the inevitable legal results.

## POINT II.

THE ARGUMENTS MADE UNDER POINT III AND IV OF DEFENDANT-APPELLANT ANSWER BRIEF ARE BASED UPON ERRO NEOUS FACTS. THERE WAS NO QUORU PRESENT TO AUTHORIZE EITHER OF TH RESOLUTIONS.

Under Points III and IV of defendant-appellants' answer brief (pp. 11 and 14) defendant-appellants developed the theory that since the articles of incorporation were amended by a special stockholders' meeting held February 27, 1957, fixing a board of seven directors that the meeting of December 14, 1956, authorizing salaries and the meeting of December 26, 1957, authorizing the sale of corporate properties and the distribution of the funds among themselves were valid acts passed by a quorum of directors.

What the defendant-appellants fail to disclose is that the articles of incorporation, prior to amendment, provided for a board of at least three and nor more than twenty-five directors. (See, p. 4, Ex. P-7.) This provision empowered the stockholders to fix the size of the board within the limits set and on the 17th day of July, 1956, the stockholders passed a resolution:

> "2. That the board of directors be increased to seven members." (R. 140, Minute Book, p. 41, Ex. P-2.)

As a consequence for the directors to pass any valid resolution there must have been at least four dis-interested directors present at a meeting propertly called for that purpose. At neither of the meetings was there such a quorum present.

The fact that subsequently, in February of 1957, the corporation amended its charter to provide for a fixed board of seven members is a totally irrelevant fact. The board had already been fixed at seven members during

the period when the meetings in question were held, the resolutions passed and the subsequent amendment did not alter or effect the action of the stockholders in previously fixing the board at seven members.

The plaintiff-respondents will not cite further authority for the proposition that no quorum of directors was present at either meeting since the law on this subject has already been analyzed under Points I-B and C of its brief previously filed.

## CONCLUSION

The court should modify the judgment of the trial court granting judgment against the defendants jointly and severally for the amount of the salaries paid, together with interest, and should enter judgment against the defendants for the portion of the $130,000.00 which was not received by the corporation.

Respectfully submitted,

GORDON I. HYDE
555 East 4th South
Salt Lake City, Utah
*Attorney for Plaintiffs, Respondents and Cross-Appellants*